

## THE IMPLEMENTATION OF CONCILIATION PROCEDURES IN THE CIVIL PROCESS: THE EXPERIENCE OF RUSSIA AND BRAZIL

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### Abstract

Currently, the reforms of civil proceedings are taking place everywhere due to the complexity of the procedure, long procedural periods, and high legal costs. The judicial way of protecting the law has recently ceased to satisfy the current trends in dispute resolution, and consequently, the social function of justice has decreased. A lengthy and costly lawsuit deprives the majority of the world's population of the right to judicial protection.

Alternative dispute resolution methods, such as mediation, arbitration, negotiation, and others that have proven to be effective, are widespread. However, in order these methods to be applied in practice, legislative consolidation of these methods is necessary; therefore, at present, conciliation procedures are included in the procedural legislation, and the Russian Federation and the Federative Republic of Brazil are no exception.

The 2016 Brazilian Code of Civil Procedure enshrines conciliation procedures not only as alternative methods but rather as an obligatory stage of civil proceedings. The purpose of such transformations of the civil process is to offload the courts by introducing pre-trial methods of dispute settlement. A new participant, the "judicial mediator," has appeared, who, interacting with the parties, does everything to ensure that the dispute is resolved without judicial proceedings. At each court, centers for reconciliation are created, the purpose of which is to implement the mediation procedure, which makes this method promising.

Since 2018, the "procedural revolution" has been phased in the Russian Federation, which fundamentally changes the trial by introducing conciliation procedures, namely mediation, and the judicial mediator.

This article analyzes and compares civil proceedings in the Russian Federation and Brazil. The conclusions of the study allow us to identify the strengths and weaknesses of the conciliation procedures, as well as the prospects for their implementation in the civil processes.

**The goal** is achieved by solving several tasks:

- To explore the features of dispute resolution through conciliation procedures in the civil proceedings of the Russian Federation and Brazil;
- To identify the problems of implementing the mediation procedure as a way to resolve disputes in the Russian Federation and Brazil;

- To highlight a new way to resolve disputes through a "judicial mediator" in the Russian Federation and Brazil.

The **research methodology** is based on both qualitative and quantitative analysis, as well as on the method of empirical experiment. The study of civil procedural legislation, as well as some national sources and other normative acts, was carried out using specific research methods, logical, statistical, and content analysis. During the study, the authors relied on the results of research by Russian and foreign law theorists in the considered and related fields of knowledge.

The **results** of the study can be used to determine key goals and objectives of a procedural nature, improve the functioning of judicial and extrajudicial institutions, law enforcement, research activities, as well as in educational and teaching activities, in particular, during lectures and seminars on courses of civil procedure, arbitration process, and private international law.

**Keywords:** mediation, judicial mediator, alternative methods of dispute resolution, civil procedure code.

## 1. INTRODUCTION

Currently, the leading economies of the world are focused on economic leadership, which in turn makes it necessary to create certain conditions for this to be feasible. [2] The judicial system of these countries plays an essential role since the diversity of economic ties inevitably leads to disputes, some of which can only be resolved by the court. Legal proceedings are often an expensive, lengthy, and complicated process, so its reform is a prerequisite for attracting foreign investments. [1]

Most countries of the world have taken the path of introducing alternative methods for resolving disputes such as mediation, arbitration, negotiations, and others that have proven their effectiveness. However, not all disputes may be the subject of such procedures; therefore, legal proceedings should become an effective method of resolving disputes.

The judicial systems of Russia and Brazil are characterized by their workload, due to the universality of the said method of protecting the rights and interests of the parties. This situation can be resolved by introducing intermediation and judicial mediation into the judicial process, namely, their legislative consolidation in the civil procedural codes. First of all, it is necessary for this method to become real and effective for many citizens and stop being mythical and virtual.

The 2016 Brazilian Civil Procedure Code establishes conciliation procedures not as alternative methods, but as an obligatory stage of civil proceedings. The purpose of such transformations of the civil process is to ease the courts by implementing these procedures. In addition, a new participant, the "judicial mediator," emerged who, working with the parties, does everything to ensure that the dispute is resolved without legal proceedings, although he is not legally a participant in the process. Also, reconciliation centers are created at each court, the purpose of which is to implement intermediation and judicial mediation procedures, making these methods promising for their practical application.

Since 2018, the "procedural revolution" which has been taking place in the Russian Federation, fundamentally changes the trial, introducing conciliation procedures into it, namely mediation and the judicial mediator. It should be noted that, compared with Brazil, the Russian legislator is at least three years late, perhaps due to the fact that in addition to legal changes, economic opportunities are needed to implement such programs. [3]

## 2. METHODOLOGY

The research methodology is based both on the general scientific methodology of cognition of reality and private-scientific methods: historical, system-structural analysis, comparative legal analysis, analysis of judicial practice data. The study of procedural legislation, mediation, and legal consultation, as well as several national sources and other regulatory acts was carried out using the methods of specific research, logical and statistical analysis. In work, the authors relied on the results of research by Russian and Brazilian legal theorists in the considered and related fields of knowledge.

## 3. RESULTS

General characteristics and the order of application of conciliation procedures in Russia and Brazil

### **3.1. Russian Experience**

On July 26, 2019, the Federal Law “On Amending Certain Legislative Acts of the Russian Federation” was adopted in the Russian Federation, which introduces amendments in the Civil Procedure Code, the Code of Arbitration Procedure, “Fundamentals of the Legislation of the Russian Federation on Notaries” and others. [4] The legislator has gone along the path of introducing conciliation procedures not only in civil proceedings but also in the administrative process. Hence, the possibility for peaceful settlement of disputes, regardless of the subject composition and subject of the dispute, except as provided by law has been emerging. In the global practice, there are very few such restrictions; all disputes, including financial ones, can be resolved through conciliation procedures.

The bulk of the changes concern the conciliation procedures, the settlement agreement, the adoption of the statement of claim, the preparation of the case for trial, as well as the candidacies of the intermediary and judicial mediator.

Judges have new tasks in resolving civil, economic or other disputes related to entrepreneurial activity. Besides the existing ones, a “new” one has appeared - the peaceful settlement of disputes. [5] Previously, the peaceful settlement of the dispute was considered as the goal of the trial and was achieved by concluding an amicable agreement between the parties; now it is not only the conclusion of an amicable agreement but also the possibility of resorting to conciliation procedures.

The circle of persons participating in the case having the power to participate in a settlement has expanded: in addition to the parties and third parties that declare independent claims on the subject of the dispute, now third parties who do not declare independent claims on the subject of the dispute if they acquire rights or have an obligation can also be parties of the conciliation.

The requirements for the form and content of the statement of claim have increased: now it is necessary to indicate information about actions taken by the party (parties) aimed at reconciliation if such actions were taken, and it is also necessary to confirm these actions by the documentary. Similar requirements are asserted for a claim of the respondent, information is required on the actions taken by the respondent aimed at reconciliation, if such actions were taken or the respondent's opinion on the possibility of reconciliation of the parties.

At the preliminary stage, the judge's main task is to notify the parties of the opportunity to file a motion for consideration of the case with arbitrators (arbitration), seek the assistance of a court or mediator, including an intermediary, a court mediator, in order to resolve the dispute or use other conciliation procedures, as well as oblige persons participating in the case to perform specific actions on time.

Besides, the task of encouraging the parties to conclude a settlement agreement also remains. Thus, at a preliminary hearing, the judge finds out the views of the parties about the possibility of resolving the dispute, invites the parties to use conciliation procedures; upon revealing the intention of the parties to appeal to the judicial mediator, the court shall approve the candidate they have chosen.

The procedure for the parties to appeal to conciliation procedures is clearly regulated by law. Legal principles have been established on the basis of which the conciliation procedures should be carried out: voluntariness, cooperation, equality, and confidentiality. The principle of equality means that the parties enjoy equal rights when choosing a conciliation procedure, determining the conditions for its conduct, choosing the candidacy of an intermediary, conciliator, judicial mediator. The parties can apply for conciliation proceedings at any stage, including at the stage of court enforcement proceedings. The principle of cooperation obliges all persons involved in the reconciliation of the parties to do everything to ensure that this procedure is carried out successfully.

What is new is that the court itself can recommend the parties to apply for conciliation proceedings both in writing - in the rulings on the adoption of the statement of the claim, on the preparation of the case or otherwise, as well as orally - at one of the hearings. In the event of a positive decision of the parties, the court makes a decision on the conciliation procedure and, if necessary, on the adjournment of the trial. The definition may contain issues that must be resolved during this procedure, as well as its duration. If the parties have not reconciled, refused to hold it, or the deadline has expired, then the trial will resume.

It should be noted that the period during which the conciliation procedure was carried out, and the proceedings were postponed are not included in the time limits for the consideration of the case, but are taken into account in a reasonable period of legal proceedings. As a rule, the period for conciliation procedures will be two months.

The legislator referred to the conciliation procedures these options: negotiations, mediation, and judicial reconciliation. Negotiations can be carried out both on the basis of the law and the agreement between the parties that is, voluntarily. The mediation procedure is carried out in accordance with the Federal Law "On an Alternative Dispute Resolution Procedure with the Participation of a Mediator (mediation procedure)" and other procedural legislation. [6]

Judicial reconciliation is carried out by the judicial mediator on the basis of the principles of independence, impartiality, and the integrity of the judicial mediator. The procedure for carrying out this procedure is regulated by procedural legislation and the Rules for judicial reconciliation, approved by the Supreme Court of the Russian Federation. A judicial mediator may be a retired judge who has expressed his desire to do so; the list of judicial mediators is approved by the Plenum of the Supreme Court of the Russian Federation.

The parties themselves select a judicial mediator from this list, and the candidacy is approved by the judge by definition. The duties of the judicial mediator include explaining to the parties the validity of the stated claims and objections during the negotiations with the persons participating in the case, studying the case materials with the consent of the court to successfully resolve the dispute, giving the parties recommendations for maintaining business relations and resolving the conflict. The judicial mediator is not a participant in the trial and is not entitled to perform actions that entail the emergence, change or termination of the rights or obligations of persons participating in the case and other participants in the process. The judicial reconciliation procedure takes place at a strictly specified time under the control of the court, so the judge has the right to make a request no more than once every fourteen calendar day. This is done in order to control the process flow.

The results of conciliation procedures in resolving economic disputes may be:

1. The conclusion of a settlement agreement in respect of all or part of the claims;
2. Partial or complete rejection of the claim;
3. Partial or full recognition of the claim;
4. Full or partial waiver of the appeal, cassation appeal, supervisory appeal (submission);
5. Recognition of the circumstances on which the other party bases its claims or objections;
6. Agreement on the circumstances of the case;
7. Signing a letter of consent for state registration of a trademark.

Depending on the type of proceedings, the result of the conciliation procedures is different, so when considering economic disputes arising from administrative and other public legal relations, these are:

1. Recognition of the circumstances of the case, agreement of the parties on the circumstances of the case;
2. An agreement of the parties containing the qualification of the transaction concluded by the person participating in the case, or the status and nature of the activity of that person;
3. Partial or complete rejection of the requirements, partial or full recognition of the requirements, including reaching an agreement by the parties on the assessment of circumstances as a whole or their individual parts;
4. Amicable agreement, if the conclusion of the amicable agreements is attributed to the powers of the corresponding administrative body participating in the case by federal law.

In addition, if the parties before applying to court demanding to challenge non-normative legal acts, decisions and actions (inaction) of bodies and officials to recover mandatory payments and sanctions did not use pre-trial settlement of the dispute, the arbitration court shall have the right to propose the use of conciliation procedures with the consent of the parties.

The result of the conciliation procedures in resolving civil disputes may be:

1. The conclusion of an amicable agreement in respect of all or part of the stated requirements;
2. Partial or complete rejection of the claim;
3. Partial or full recognition of the claim;
4. Full or partial waiver of the appeal, cassation appeal, supervisory appeal (submission);

5. Recognition of the circumstances on which the other party bases its claims or objections.

The result of the mediation procedure is the conclusion of a mediation agreement. If it was achieved outside the court proceedings or arbitration, in order to give it greater significance, it can be notarized and become an executive document at the same time, which means that its execution is possible in order proceedings if its conditions are not fulfilled voluntarily.

### **3.2 Brazilian Experience**

In the Federal Republic of Brazil, the Civil Procedure Code entered into force on March 18, 2016, which reformed all civil proceedings. [7] Section 5 regulates judicial reconciliation and mediation, despite the fact that the Law on Mediation of June 26, 2015, is still in force. [8] According to the changes, judicial reconciliation centers should be established at each court, offering the parties to use various procedures, including mediation to resolve disputes, as well as for developing programs aimed at helping the parties resolve the dispute on their own. The procedure for creating such centers is regulated by the relevant court and the rules of the National Council of Justice.

According to the legislation, the conciliator is an independent person who is not in any relationship with the parties, who can offer a solution to the dispute without coercion and pressure on them, and as a mediator should be a person who had a relationship with the parties and can help clarify to them the essence of the conflict and find a way to solve it, so that they can restore their relations on a mutually beneficial basis. Judicial conciliators, mediators, private mediation centers and chambers must be registered in the National Register and in the register of the court of appeal or the federal court of appeal of the district, which keeps a record of qualified specialists with reference to their field of activity. They must undergo specialized training, as well as be registered in these registers, which give them the opportunity to be selected for this mission in the future.

The Civil Procedure Code clearly regulates the procedure for choosing a conciliator or mediator, as well as the opportunity to familiarize themselves with the effectiveness of their activities, and sets limits on their activities, except for this one. However, the choice of the candidacy of the conciliator or mediator belongs to the parties: besides, there may be several.

Judicial reconciliation and mediation are carried out based on the principles: independence, impartiality, the autonomy of the will, confidentiality, orality, informally and accurately understanding the essence of the decision, the consciousness of decision making. One of the most crucial principles is the principle of confidentiality, which means that the information obtained during this cannot be used otherwise than agreed by the parties in their decision, as well as all persons who have been involved in this procedure at least somehow are required to keep secret. In addition, they cannot be subpoenaed to testify in the case in which they participated. It is acceptable to use negotiations to make this process more comfortable for the parties. However, the principle of autonomy of the will is the most important for the parties, as it guarantees the parties the right to choose a procedure, including the process itself. They should carry out their activities based on the independence and impartiality: otherwise, their registration will be canceled, for example, if it is proved that they acted with malicious intent, or as a result of their activities, the rights of the parties were violated.

The federal government, states, the federal district, and municipal districts create individual conciliation chambers to resolve administrative disputes, that is, with the participation of state bodies and organizations, including in the field of public administration.

## **4. FINDINGS**

The analysis of the implementation of conciliation procedures in the civil proceedings of Russia and Brazil allows us to identify both standard features and differences. The main thing is the legislator's commitment to the chosen path - the path of popularizing and even requiring the use of judicial reconciliation and mediation.

The legislative consolidation of these procedures in Brazil is more specific, and the procedure is clearly understood: how, where, and by whom. The Brazilian Code of Civil Procedure provides for the establishment of specialized conciliation centers at each court, which significantly increases the attractiveness of these methods. Besides, the requirements for a judicial mediator, registration as such, payment for services, and much more are clearly defined.

In the Civil Procedure Code of the Russian Federation, the Arbitration Procedure Code of the Russian Federation, the Code of Administrative Procedure of the Russian Federation, these procedures are fragmented only as an opportunity to appeal to them during the trial; the parties will be forced to study other

acts which will describe these procedures in more detail, which will complicate the appeal to them. The codes define goals, objectives, and principles on which conciliation procedures should be based.

In addition, it is essential that for the first time, it is possible to resolve administrative disputes through mediation or judicial reconciliation. A distinctive feature of the Russian legislator is that the Civil Procedure Code clearly lists the results of these procedures, that is, what decisions can be made depending on the type of procedure.

Unlike Russia, in Brazil the new Code of Civil Procedure has been in force for more than 3 years and conclusions can already be drawn on the effectiveness of these procedures: the mediation procedure as a way to resolve disputes is included in agreements with municipalities, according to the Law on the Municipality (No. 16.873 / 2018). [9], moreover, the effectiveness of these procedures can be proved by the number of complaints filed against the decisions that have been reduced in recent years. [10]

Summing up, we can conclude that mediation and judicial reconciliation procedures have a great future as effective, quick and universal methods for resolving disputes, the purpose of which is to maintain the partnership between the parties, they are of particular importance for the BRICS countries, whose economic partnership has been increasing. [11]

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